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C O N F I D E N T I A L SECTION 01 OF 03 THE HAGUE 001715

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DEPARTMENT FOR S/WCI - PROSPER/RICHARD, EUR/SCE -
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E.O. 12958: DECL: 1.6 FIVE YEARS AFTER CLOSURE ICTY
TAGS: [BK](#) [HR](#) [KAWC](#) [NL](#) [PHUM](#) [PREL](#) [SR](#) [ICTY](#)
SUBJECT: ICTY: MILOSEVIC'S POOR HEALTH TRIGGER'S "RADICAL"
REVIEW OF CASE BY COURT AND PAVES WAY FOR IMPOSITION OF
DEFENSE COUNSEL

Classified By: Legal Counselor Clifton M. Johnson per 1.5(d).

[11.](#) (C) Summary: The trial chamber hearing the case against Slobodan Milosevic before the International Criminal Tribunal for the former Yugoslavia (ICTY) postponed the July 5 commencement of the defense case due to the Accused,s poor health. During the hearing, Milosevic accused the Tribunal of damaging his health by ignoring his requests for additional time to prepare his defense case and rejected various suggestions by the Chamber and Prosecution to ease the trial burden. In an order issued on July 6, the Chamber decided to commence the defense case on July 14 and then recess on July 21 until August 31. The order expressed the Chamber,s view that a "radical review of the future conduct of the trial" was in order, while noting that there was "no evidence" to suggest that Milosevic was unfit to stand trial at all. Signaling that the likely outcome of this review was the imposition of stand-by counsel on Milosevic, the Court ordered the Registrar to identify trial counsel who might be assigned to the case. End Summary.

From Trial to "Administrative" Hearing

[12.](#) (C) Complaining of illness, and supported by reports from his cardiologist, Milosevic did not give his much anticipated opening statement -- the first stage in the defense component of the case-- at the July 5 proceedings. Instead, presiding Judge Patrick Robinson (Jamaica) convened the hearing to discuss the "administrative" issues raised by the Accused,s continuing ill health. A July 1 medical report received by the Court, which Robinson read in Chambers, noted Milosevic,s very high blood pressure (200/130) and the injury to his heart that the ailment has already caused. The report noted that when under stress the pressure is increased further, but with rest the "situation returns to normal." The report contained a recommendation from the consulting cardiologist, Dr. van Dykman (a highly regarded Dutch physician), that the Accused be allowed to rest at least until July 9. (Comment. Embassy legal officers observed that Milosevic, while speaking firmly, appeared somewhat worn and moved a bit stiffly, wincing once (a touch theatrically) near his left shoulder. End comment.)

[13.](#) (SBU) Robinson asked the three parties present for their comments on the report. Milosevic angrily protested his presence in the courtroom, stating that a doctor who had examined him that morning at the detention facility told him that he was not fit to stand trial at this time. Claiming maltreatment and further loss of preparation time due to sickness, Milosevic demanded an additional month to prepare. He noted that court appointed physicians had previously advised that he should work only three days a week. Given the need for preparation time, he was essentially proposing that the court hold no more than one or two trial sessions each week. He reiterated his categorical refusal to accept the appointment of counsel. He also rebuffed any of the Court,s suggestions about ways to alleviate his stress, such as Judge Bonomy,s suggestion that he deliver his opening statement in writing or the notion, raised by Chambers, that he participate in the proceedings via video link at the detention facility. Amicus Steven Kay stated that the Accused,s "pronounced decline in health" raised not only the issue whether the accused was fit to present his own case, but also whether he was fit to stand trial at all. Lead prosecutor Geoffrey Nice, repeating OTP,s long-held position, argued that counsel must be imposed on Milosevic, contending that the reason his blood pressure was so elevated was due to the stress of preparing his defense.

A Solution?

[14.](#) (SBU) In its order of July 6, the Court stated that a "radical review" of the trial,s conduct was necessary and set forth the key factors that will guide its decision. The Court noted that Milosevic,s poor health has resulted in numerous interruptions of the trial and the loss of 66 days

during the Prosecution,s case. Further, Milosevic,s poor health was likely to recur. At the same time, the Court noted that "there is no evidence that the Accused is not fit to stand trial at all, but there is evidence that the health of the Accused is such that he may not be fit to continue to represent himself, and that his continuing to represent himself could adversely affect the fair and expeditious conduct of the trial." Further the Court noted that when it had last declined to impose defense counsel on Milosevic in April 2003 it had stated that "the right to defend oneself in person is not absolute ... there may be circumstances ... where it is in the interest of justice to appoint counsel." The Court then referenced the imposition of stand-by counsel in the Seselj case and said that "it may be necessary to assign counsel to the Accused, and/or adopt other measures to ensure a fair and expeditious conduct of the trial." Noting that it is "in the interests of the Accused and the broader interests of justice that this trial be conducted and concluded within a reasonable period of time" the Court concluded that it was "incumbent upon the Trial Chamber to identify measures for the continuation of the trial which are efficient, sensitive to the health of the Accused, and conducive to the fair an proper presentation of the defense."

15. (C) The Court,s order stopped short of determining the specific measures it would impose; instead, it set the stage for a later decision by ordering that the defense will commence on July 14 for one week and then go into recess from July 21 until August 31. Second, the Registrar will identify counsel who might be assigned to the case if the Court requests it. The chamber also requested that a new cardiologist, with no prior involvement in the treatment of the Accused, examine Milosevic and "report to the Trial Chamber on the fitness of the Accused to continue to represent himself and the likely impact on the trail schedule should he continue to do so." The purpose of this seems aimed less at Dr. van Dykman, an eminent physician agreed upon by both sides whose conclusions are not contested, than at establishing a fresh opinion on the extent to which Milosevic,s health can handle the stresses of mounting a defense and the costs in terms of trial time if he were to continue to do this alone.

Comment

16. (C) The hearing crystallized two issues that have had a dominant impact on the trial from its inception. First, Milosevic again proved himself a master at stage-managing the proceedings. He threw the judges off balance at the outset of the hearing by demanding why the Court had insisted on his presence when the detention facility physician had pronounced him unfit that morning. (He did not mention that the physician had thought he was attending a full trial session rather than an administrative hearing). He also skillfully played the health card to present himself as the victim of a Tribunal that is predestined to convict him, blaming the Court for deliberately injuring his health by refusing his requests for additional preparation time. At the same time that he was portraying himself as a victim, he defiantly refused every suggestion by the Court and Prosecution for measures that might ease the stress on his health. The result was to place the Court in a position where, short of discontinuing the trial, any other measure it took to help Milosevic would be over his strong objection.

17. (C) The second issue highlighted during the hearing was the ongoing impact of Milosevic,s unstable health. With the trial moving to a defense phase, where Milosevic must not merely respond to Prosecution evidence but advance a defense, the stress on his health will continue to increase. The Chamber is therefore faced with the untenable option of allowing the trial to limp ahead uncertainly for years with a day or two of hearings per week or take "radical" action. The Chamber,s order strongly hints that it is poised to do the latter, and we expect it to impose stand-by defense counsel this summer. By buying additional time for an assessment of the situation, foreshadowing the appointment to the public, granting Milosevic more time to prepare his defense, and getting a second medical opinion on which to base its decision, the Court is skillfully laying the groundwork for the imposition of counsel. While this course of action, realistically the only way forward, is defensible legally and manageable in terms of public perception, whether it will actually work is an open question. Some basic level of cooperation between Milosevic and such counsel is essential, and it remains to be seen whether Milosevic will seek to push the trial to a crises point through noncooperation or be content, as he is with the Amici, to castigate them publicly while working with them behind the scenes to advance his defense. End comment.
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